

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

2016 FEB -3 P 2:34

James Harold Parker,

Petitioner,

v.

Warden of FMC-Lexington,

Defendant.

Civil Action No. 9:15-3681-RMG

ORDER

This matter is before the Court on the Report and Recommendation of the Magistrate Judge (Dkt. No. 13) recommending that this Court dismiss the petition for a writ of habeas corpus without prejudice. The Court declines to adopt the Report and Recommendation and instead dismisses the action as a duplicative filing.

On September 14, 2015, Petitioner, a Federal prisoner, filed a *pro se* petition for habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner pled guilty to felon in possession of a firearm and ammunition and was sentenced to 216 months incarceration on August 3, 2005. His Armed Career Criminal Act of 1984 (18 U.S.C. § 924) (“ACCA”) predicate offenses were assault and battery of a high and Aggregated Nature, Burglary in the second degree, and common law robbery. He previously raised ineffective assistance of counsel claims in a § 2255 motion, which was denied. Order, *United States v. Parker*, 4:04-cr-791-TLW (D.S.C. May 6, 2009), Dkt. No. 88.

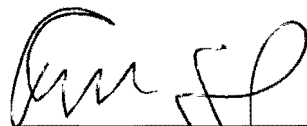
In this Petition, he argues that *Johnson v. United, States*, 135 S. Ct. 2551 (2015), was a substantive change in criminal law allowing him to challenge the enhancement of his sentence under the ACCA. The Magistrate Judge issued a proper form order on October 15, 2015, which was mailed to Petitioner’s last reported address. That mail was returned as undeliverable. The proper form order was re-mailed to updated addresses on November 2, 2015 and December 11,

2015.¹ (Dkt. Nos. 9, 11.) No response to the proper form order has been received. On January 14, 2016, the Magistrate Judge therefore recommended dismissal without prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure. Petitioner filed no objections to the Report and Recommendation.

However, the Court observes that Petitioner currently has a “Motion to Be Re-Sentenced Pursuant to 28 U.S.C. § 2241” pending before the Honorable Terry L. Wooten in the Florence Division.² Mot., *Parker*, 4:04-cr-791-TLW (June 17, 2014), Dkt. No. 110. Petitioner is there represented by CJA-appointed counsel. Chief Judge Wooten has ordered that motion held in abeyance pending the Fourth Circuit’s decision in *Surratt v. United States*, No. 3:04-cr-250-19, 2014 WL 2013328, at *4–7 (W.D.N.C. May 16, 2014) *aff’d*, 797 F.3d 240 (4th Cir. 2015), *reh’g en banc granted* (Dec. 2, 2015). *Surratt* “squarely addresses the issue” Petitioner raises concerning his sentence. Order, *Parker*, 4:04-cr-791-TLW (Sept. 2, 2014), Dkt. No. 124.

Therefore, the Court declines to adopt the Report and Recommendation of the Magistrate Judge, and **DISMISSES** the Petition as a duplicative filing.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

February 3, 2016
Charleston, South Carolina

¹ Petitioner was an inmate at FMC Lexington, Kentucky when he filed his Petition. He is now an inmate at FCI Jesup, Georgia.

² That motion is docketed as “Motion to Vacate under 28 U.S.C. § 2255.”